

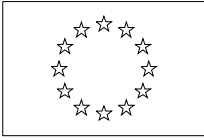
***Case No COMP/M.2315 -
THE AIRLINE GROUP /
NATS***

Only the English text is available and authentic.

**REGULATION (EEC) No 4064/89
MERGER PROCEDURE**

Article 6(1)(b) NON-OPPOSITION
Date: 14/05/2001

*Also available in the CELEX database
Document No 301M2315*



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 14/05/2001

SG (2001) D/288530

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EEC) No 4064/89 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

PUBLIC VERSION

MERGER PROCEDURE
ARTICLE 6(1)(b) DECISION

To the notifying parties:

Dear Sir/Madam,

Subject: Case No COMP/M.2315- THE AIRLINE GROUP / NATS

Notification of 05.04.2001 pursuant to Article 4 of Council Regulation No 4064/89

1. On 05.04.2000, the Commission received a notification of a proposed concentration pursuant to Article 4 of Council Regulation (EEC) No 4064/89¹ ("The Merger Regulation") by which the "The Airline Group Limited" (The Airline Group) acquires joint control of UK's main National Provider of Air Traffic Services (NATS).
2. After examination of the notification, the Commission has concluded that the notified operation falls within the scope of Council Regulation (EEC) No 4064/89 and does not raise serious doubts as to its compatibility with the common market and with the EEA Agreement.

THE PARTIES

3. *The Airline Group* is a special purpose vehicle formed by seven leading airlines in order to bid to acquire and hold the 46% interest in NATS. The Airline Group's capital is held by the following airlines: Airtours International Airways Limited, Britannia Airways Limited, British Airways plc, British Midland Airways Limited, easyjet Airline Company

¹ OJ L 395, 30.12.1989 p.1; corrigendum OJ L 257 of 21.9.1990, p. 13, last amended by Regulation (EC) No 1310/97 (OJ L 180, 9.7.1997, p.1, corrigendum OJ L 40, 13.2.1998, p.17).

Limited, Monarch Airlines Limited and Virgin Atlantic Airways Limited. Each of the airlines is active in the provision of air transport services, either scheduled or charter.

4. NATS has two main activities:

- Provision of “en route” air traffic services in UK airspace and over the Atlantic ocean. As is usual in this sector, NATS has a statutory monopoly for that activity;
- Provision of “airport” air traffic services at UK airports. NATS is the UK’s main provider of such services.

THE OPERATION

5. The proposed transaction concerns the acquisition by the Airline Group of a 46% stake in NATS. Until March this year NATS was wholly owned by the Civil Aviation Authority, a statutory corporation whose board members are appointed by the Crown.
6. As a result of a bid process, which began in July 1997, the Government announced on 27 March 2001 that the Airline Group had been chosen to be the Government’s strategic partner. The UK Government describes this arrangement as a public/private partnership (PPP) with the Airline Group being the strategic partner. One of the UK Government’s objectives for the NATS public private partnership is to “*ensure the strategic partner takes responsibility for managing strategy, investment programme and new business development*”.
7. On 31 March NATS’ ownership was transferred to the UK Government. After the proposed transaction, it will be jointly controlled by, on the one part, the Airline Group and its shareholders, and on the other, the UK Government through the Crown Shareholder. Each of the seven airlines, which will have equal voting rights within the Airline Group, has to be considered as an undertaking concerned within the meaning of article 1 of the Merger Regulation. This is because the Airline Group is simply a vehicle set up to enable the seven to participate in NATS in order to facilitate decision-making amongst themselves and to ensure that they speak and act as one. The individual shareholders of the Airline Group will have strong commonality of interest in its direction and, through it, of NATS. The seven thereby ensure that they can exercise a decisive influence with the Airline Group on NATS. Each of the seven airline shareholders in the airline group will have the right to appoint one director to the Board. Board decisions are taken by simple majority. This means that at least four out of the seven airlines have to agree on a proposal. In the case of deadlock the chairman of the Board will have a casting vote. Therefore, there can never be a situation where the Crown shareholder exercises sole control through the seven airlines being unable to reach a common position on any decision.
8. Accordingly, the operation is a concentration within the meaning of article 3 1 b) of the Merger Regulation.

COMMUNITY DIMENSION

9. The undertakings concerned have a combined aggregate world-wide turnover of more than EUR 5 billion. At least two of them have Community-wide turnover in excess of EUR 250 million and they do not achieve more than two-thirds of their aggregate Community-wide turnover within one and the same Member State. The notified operation therefore has a Community dimension within the meaning of Article 1(2) of

the Merger Regulation. Since at least two undertakings concerned have a turnover exceeding EUR 250 million in the territory of the EFTA States, the concentration constitutes a co-operation case under the EEA Agreement, pursuant to Article 58 of that Agreement.

CONCENTRATION

Joint control

10. NATS will be jointly controlled by the Crown shareholder and the seven airlines who will act together through the Airline Group. The Airline Group will vote its shares as a block. The joint control by the Airline Group and the Crown shareholder will be exercised pursuant to a Strategic Partnership Agreement. The aim of this is to give the Strategic Partner overall management control and responsibility for the day-to-day operation of NATS. However, the Crown Shareholder will, together with the Airline Group, be involved in the strategic direction of NATS. In particular, under the provisions of the Strategic Partnership Agreement, the approval of the Directors appointed by each of the Crown Shareholder and the Strategic Partner is required for the adoption of any new business plan or any amendment, departure or change in the current business plan.

Full functionality joint venture

11. The Airline Group and the Crown Shareholder will acquire joint control over NATS, which will be a full function joint venture within the meaning of article 3 (2) of the Merger regulation. NATS will perform on a lasting basis all the functions normally carried out by air traffic control undertakings. NATS will also have a management dedicated to its day-to-day operation, and will have access to sufficient resources including finance, staff and assets in order to conduct its business activities. NATS will be an autonomous economic entity in commercial, financial and operational terms.
12. The structure of the company will be as follows: there will be a holding company “National Air Traffic Services (N°2) Limited” (NATS 2), whose board will determine the strategy of the NATS group as a whole. NATS 2 will have a 100% share in a second holding company, “National Air Traffic Services Limited” (NATS Ltd). This will in turn own two operating subsidiaries, one licensed, “NATS *En route* Limited” (NARL), which will provide “en route” air traffic services and one unlicensed that will provide airport air traffic control services, “NATS (Services) Limited (NSL).

RELEVANT MARKETS

Air traffic services

13. Air traffic services can be divided into “en route” and “airport traffic services”. “En route” services consist of air traffic controllers giving instructions to aircraft en route over national airspace (as opposed to those in the vicinity of airports), so that those aircraft are safely separated to agreed standards. “Airport traffic services” relate to control of air traffic within 15 miles of an airport, and comprise airport approach, landing and take off.
14. The parties believe that “en route” and “airport traffic services” should be divided into two separate product markets. Although there is substitutability from the supply point of

view, given the legal regimes applicable to each of them (national monopoly licence for “en route” and competitive bidding for “airport traffic services”) the parties believe that two separate product markets should be distinguished.

15. Given that the transaction will not lead to the creation or strengthening of a dominant position in any possible market definition, it is not necessary to assess in the present case if “en route” and “airport traffic services” constitute separate markets.
16. As regards the geographical scope for this/these market(s), according to the investigation, it can be concluded that it/they is/are not larger than national given that “en route” services are always provided on a national basis by national undertakings. As regards “airport air traffic services” the UK is the only country within the EU where they are liberalised and, at this stage, these services are mainly provided by national providers (within the UK by British companies Serco and NATS). It is possible that each individual airport should be considered as a separate relevant market in relation to airport air traffic services as competitive conditions differ between them. However, for the purposes of this assessment it is not necessary to decide upon the precise boundaries of the relevant market, since, however defined, no competition concerns arise.
17. Some third parties consider the London Area as a relevant geographic market. In this respect, it has been pointed out that London Area is a separate geographic market because of its degree of congestion and the fact that all movements are centralised from the London Area Terminal Control Centre, operationally closely integrated with the “en route services of that area”. This centre is located at the Heathrow Tower and the Thames radar operated by NATS and good quality co-ordination with the centralised services is needed from all airports. Notwithstanding this, the question whether the London area constitute different geographic market can be left open as, in any case, the operation does not raise competition concerns.

Airport services

18. In the past the Commission has considered the following market definitions² as relevant in relation to the Berlin airport.
19. The relevant product market can be divided in the provision of both air-traffic infrastructure (for instance take-off and landing runways) and ground services (for instance passengers handling and luggage control). Furthermore there is a market for services in the non-aviation field (for instance restaurants, duty free shops, catering, car parks).
20. The relevant geographic markets were defined on the basis of a 100 km catchment area radius as far as regional airports are concerned and on the basis of a 300 km catchment area radius for international airports.
21. However, the exact geographic market definition in the present case can be left open since, in any of the alternative geographic markets, the concentration will not lead to the creation or strengthening of a dominant position which could significantly impede effective competition in the Community or in the EEA or any substantial part of it.

² Case IV/M.1255 privatisation

Air transport services

22. All the members of the Airline Group are active in the provision of air transport of passengers (scheduled or charter). The Commission has previously distinguished the supply of airline seats to tour operators for incorporation into package tours from sales to individuals. The provision of these services is not substitutable as prices and conditions are different. Individual passengers purchase tickets directly from the airline, whereas tour operators combine the air transport service with other services into a package holiday tour³. As regards charter flights separate markets have to be distinguished for package holidays to long-haul and short-haul destinations; the latter comprises mainly 'sun and sea' holidays⁴, which are taken predominantly in the summer, and particularly in July and August. For scheduled flights, a further distinction has to be made according to routes. The definition of the relevant market in air transport is generally made on the basis of a route or a bundle of routes⁵. The service of the transport to a certain destination can not be substituted by a transport to a different destination. The substitutability between routes depends on a number of factors, such as the distance between the point of origin and the point of destination, the distance between the different airports situated on each side of the route and the number of frequencies available on each route⁶.
23. More specifically, in the *KLM/Alitalia*⁷ decision, the Commission concluded that each point-of-origin/point-of-destination pair constitutes a relevant market, and that such market includes a route or a bundle of routes comprising:
- The non-stop flights between the two airports concerned;
 - Non-stop flights between the airports whose respective catchment areas significantly overlap with the catchment area of the airports concerned;
 - Indirect flights between the airports concerned to the extent that these flights are substitutable for the non-stop flight. Substitutability of direct routes with indirect routes

3 Case no. IV/M 1354, Sair Group/LTU, p.14.

4 The MMC, in its 1997 Report, table 3.3, indicates that in 1996, Spain and Greece together accounted for 5.5 million package holidays from the United Kingdom out of a total for Europe (including Turkey) of 9.5 million – or nearly 60%, with Spain alone accounting for 45%. This proportion has probably decreased since then, but Spain remains the most popular package holiday destination.

5 Court of Justice, judgement in Case 66/86-Ahmed Saeed Flugreisen and Other v/Zentrale zur Bekämpfung unlauteren Wettbewerbs (1989) ECR 803; Court of First Instance, judgement in Case 2/93-Air France v/Commission (TAT)(1994) ECR 323; Commission Decision of 5.10.1992, case IV/M. 157 Air France/Sabena, point 25; Commission Decision of 20.7.1995, case IV/M. 616 Swissair/Sabena, point 19; Commission Decision of 28.2.1997 case IV/M.857, British Airways/Air Liberté, point 15, Commission Decision of 21.12.1998 case IV/M. 1354 SAirGroup/LTU, Commission Decision of 3.08.1999 case IV/M.1494 Marine-Wendel/SAirGroup/AOM.

6 See in particular Commission Decisions of 05.10.1992 (Air France/Sabena), point 25; of 27.11.1992 (British Airways/TAT), point 19; of 17.02.1993 (British Airways/Dan Air), point 10; of 20.07.1995 (Swissair/Sabena) point 19; Commission Decision of 28.2.1997 case IV/M.857, British Airways/Air Liberté, point 15; Commission Decision of 21.12.1998 case IV/M. 1354 SAirGroup/LTU.

7 See case IV/JV.19 – KLM/Alitalia

depends on a number of factors such as the flight time or the frequencies (and schedules of the routes).

24. Each city-pair as defined above constitutes a distinct market.
25. As indicated above, the relevant market includes indirect flights between the airports concerned, to the extent that these flights are substitutable for the non-stop flights. Substitutability of direct routes with indirect routes depends on a number of factors such as the flight time or the frequencies (and schedules of the routes). The Commission has recently decided⁸ that, on certain transatlantic city-pairs, customers regard certain indirect flights as suitable alternatives to non-stop services.
26. A possible distinction could arguably be made between (i) time-sensitive passengers (i.e. passengers whose main concern is to reach their destination in the shortest possible time, who are not flexible in terms of time of departure/arrival, and who require that the airline offers them the possibility to change their reservation at short notice), and (ii) non-time sensitive passengers (or price-sensitive passengers, who accept longer journey times); however, since this distinction is not decisive for the Commission's assessment, the question of whether there is a distinct market for time-sensitive passengers can be left open.
27. Finally it is not necessary to take a position on whether airports in the London area are substitutable and can be considered as a single destination point as, in any case, the transaction does not create competition concerns.

COMPETITIVE ASSESSMENT

Horizontal aspects

28. The operation will not lead to any horizontal overlap between the activities of the parent companies of the Airline Group and NATS.
29. As regards "en route" services, they are a natural monopoly and the transaction will not result in the creation or strengthening of a dominant position.

Airport air traffic control services

30. Concerning *Airport air traffic control services*, for which airports are responsible, they are provided in-house or, as it happens in most of the cases, subcontracted by the airport operator to air traffic control providers.
31. NATS has a leading (if not dominant) position if we consider the UK as a relevant geographic market where it holds a market share of [between 70% and 80%] measured by number of aircraft movements⁹. According to one of the consulted third parties, NATS leading position at national level is mainly due to the fact that NATS controls the

⁸ Case COMP/M.2041 – United/US Airways

⁹ NATS provides airport air control services in the following airports: Heathrow, Gatwick, Manchester, Stansted, Birmingham, Glasgow, Edinburgh, Aberdeen, Luton, Belfast International, London City, Southampton and Cardiff.

recruitment, training and supply of air traffic controllers within the UK. If we consider the London area as a relevant geographic market NATS has a monopoly position.

32. The Commission has considered the possibility that the Airline Group parent companies could favour NATS as the selected supplier at those airports where they are active and consolidate or strengthen its already leading (if not dominant position) as airport air control service provider. The market investigation carried out by the Commission allows to conclude that, although some airport operators consult airline users in the process of developing new contracts for airport Air Traffic services, they choose air service providers on the basis of safety, service and cost criteria and the fact that the seven airlines will be shareholders of NATS will not have any impact in their future choices.

Airport services

33. It has been pointed out that the operation could lead to the strengthening of a dominant position in the provision of Airport Services in London for a third party - British Airport Authorities (BAA), the operator of Heathrow, Gatwick and Stansted airports, to the detriment of the London City airport. This is a market that could be indirectly affected by the deal, due to the unique position of London City Airport, from where none of the seven airlines involved in The Airline Group operates. The concerns in relation to London City result from the fact that all airports in London are in the so called LTMA (London Terminal Manoeuvring Area) centrally co-ordinated by the central tower at Heathrow and dependent on the Thames radar (operated by NATS). However, it has to be borne in mind that the present situation is that BAA's position is not constrained by London City whatsoever given the limited traffic and lack of capacity of the latter to operate as a hub, therefore the transaction would not change materially the current position of BAA's airports. Moreover, the degree of congestion of Heathrow and Gatwick, (which are the two main airports in the London area that could be considered as substitutable by travellers to/from the City airport) and the expected increase in demand for slots in the London area are such that it is highly unlikely that the potential delays "caused" from NATS as a controller of the LTMA would prevent London City Airport from extending its capacity. Finally, both Lufthansa and Aer Lingus operate out of London City. The former is closely allied with British Midland and the latter is allied with BA. In these circumstances, the Airline Group should have some interest in maintaining service levels at City.

Vertical aspects

Air transport services

34. The main effect of the operation is that it would lead to a vertical integration between the provider of air traffic services (airport services and "en route" services) and certain users (i.e. the airlines) of such services. This could create incentives for the Airline Group parent companies to use NATS as a tool to reduce the competitiveness of competing airlines, thereby strengthening the position of the Airline Group parents on the downstream air transport markets (scheduled and charter) between the UK and other destinations. Although such vertical schemes may result into one competitor being a gatekeeper or in a position to increase competitor's costs, the Commission's investigation has shown that in the present case this risk will not materialise.
35. Concerns have been raised in relation to price and non-price discrimination. However, price discrimination does not appear to be possible. In relation to charges for en route

services, prices are set subject to ex ante regulations, established by national Authorities in line with the principles and formula set up by Eurocontrol, therefore the tariffs that are charged are fixed and the same for all aircraft flying the Eurocontrol area. According to the Multilateral agreement relating to route charges, member States have agreed to create a joint system for the establishment and the collection of these charges and to use for this purpose the services of Eurocontrol. Therefore, Eurocontrol calculates and bills charges on behalf of Member States. In relation to charges for Airport Air Traffic Services, as regards BAA airports other than Southampton (Heathrow, Gatwick, Stansted, Aberdeen, Edinburgh and Glasgow), NATS charges aircraft operators directly for its provision of air traffic services and the level of charges are transparent and based on landed tonnage. In the rest of the airports traffic control providers charge the airport operators (and not the airlines) for the provision of air traffic control services at the airports. The airport operator recovers the fixed cost of the service through a single airport charge to airlines for air traffic control and airport landing, consequently, it is not for NATS to fix these charges.

36. In relation to non-price discrimination, the market investigation has shown, similarly, that the operation will not risk to create or strengthen a dominant position in relation to any market in the field of air transport (charter or schedule flights). In fact, regarding quality and speed of service the CFMU (Central Flow Management Unit) of Eurocontrol applies equal treatment to all aircraft operators and ensures adherence to ATFM (Air Traffic Flow Management) by NATS. The submission of flight plans is normally effected by Aircraft Operators directly the integrated Initial Flight Plan Processing System (IFPS) the order of take-offs is centrally controlled and decided by the ATFM system which send departure slots as appropriate. Once a flight plan is approved by CFMU, the scope for NATS to be more complacent to certain aircraft operators is very limited. In case NATS decided to allow its shareholder airlines to “jump the queue” organised by the system it would be very obvious (everything is scrutinised and transparent in the radio system). In addition, the CFMU could provide statistics on differences between actual departure time versus ATFM slot, which could be used to monitor equality of treatment. Consequently, any systematic discrimination in flight plans that could lead to the creation or strengthening of a dominant position in a certain route of schedule flights and on a certain set of routes for charter flights, would be impossible to maintain. As regards landings, the scope of manoeuvre to cause delays is very reduced and could not lead to the creation or strengthening of a dominant position in a certain route. This being said, the situation is not the same in the London area, where in order to get access to the CFMU airlines need to contact NATS at the City airport, which contacts NATS at the LTMA. Given that the members of the airline group do not operate from the City airport, NATS could give preference to calls coming from other airports in the London area. Again in this case the market investigation has shown that even if flights to/from London would be discriminated, given the transparency of the system, this kind of discrimination could not be so systematic as to create or strengthen a dominant position in any city pair to/from London.

Co-operative effects

37. The formation of joint control over NATS will not lead to co-ordination between independent undertakings that restrict competition within the meaning of Article 81-1 of the EC Treaty.
38. First, the Airline Group and its seven airline shareholders, do not compete in the same market as the undertaking being jointly controlled, NATS: the acquisition therefore does

not lead to any horizontal restriction of competition. Secondly, it is true that the seven airlines forming the Airline Group are (in varying degrees) competitors with each other in the provision of air transport services. However, the co-operation between them in the Airline group does not concern the market for air transport services –they are co-operating with a view to acquiring a 46% interest in NATS, and indirectly exercising management control over NATS. There is no risk of the creation of the Airline Group leading to co-ordination that would restrict competition. Outside the limited scope of the joint venture, the commercial interest of the individual airlines militate against any collusion. They are, and will continue to be engaged in fierce competition in their main activity – the provision of air transport services¹⁰.

39. Secondly, the airline's commercial interest in the Airline Group is minuscule compared to their wider commercial interests. NATS total turnover for the year ended 31 March 2000 would have represented just [less than 5%] of the total turnover of the members of the Airline Group. There is no value for the shareholders of the Airline Group in co-operating in the provision of air transport services.

CONCLUSION

40. For the above reasons, the Commission has decided not to oppose the notified operation and to declare it compatible with the common market and the EEA Agreement. This decision is adopted in application of Article 6(1)b of Council Regulation (EEC) No 4064/89 and article 57 of the EEA Agreement.

For the Commission,

(signed)

Mario MONTI

Member of the Commission

¹⁰ British Airways and British Midland have a long history of competing with each other. More recently British Midland has joined the « Star Alliance » while British Airways is the key member of the « oneworld » alliance. These two alliances compete head-to-head in the provision of seamless travel worldwide. Virgin Atlantic's strategy differs from that of other « full » service carriers in that it does not rely on the provision of network services but focuses on the provision of point to point non-stop services on high volume profitable long haul routes; easyjet's strategy is a low cost carrier seeking to provide a « no-frills » services on a number of short haul European routes, while also competing against « full » service carriers such as British Midland and British Airways. Airtours International Airways, Britannia Airways and Monarch Airlines all provide charter air transport services. Airtours International and Britannia Airways do not provide scheduled air transport services at all; Monarch has limited scheduled air transport activities. The competition between these airlines is intense: Airtours International and Britannia Airways each are part of a larger travel and leisure group, Airtours and Thomson travel Group which are important competitors of each other.